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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

TEODORA OLIVAREZ,
PETITIONER

VS.

UNITED STATES OF AMERICA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JOSEPH A. CONNORS III
COUNSEL OF RECORD
804 PECAN
McALLEN, TX 78502-5838
(512) 687-8217

ATTORNEY FOR PETITIONER

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2826
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TEODORA OLIVAREZ,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(July 25, 1991)

Before POLITZ, DAVIS and BARKSDALE, Circuit Judges.* POLITZ, Circuit Judge:

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Convicted under 31 U.S.C. § 5324 for structuring a monetary transaction to evade federal reporting requirements, Teodora Olivarez appeals, claiming error in the jury charge and errors in her sentence. Finding no error of law in either the trial or sentencing, we affirm.

BACKGROUND

Accompanied by her mother Olivarez entered a bank and offered to pay a bank officer a commission on a monetary exchange if the bank would not file a Currency Transaction Report (CTR). The officer refused. Olivarez then went to a bank teller and exchanged $9,000 in five-dollar bills for an equivalent sum in hundred-dollar bills. Olivarez told the teller that her mother had nine thousand additional dollars to exchange. Olivarez's mother left the bank and returned with the

cash. The teller explained to Olivarez that because the exchange was for more than $10,000 a CTR must be completed. Olivarez claimed not to have identification and insisted that the bank officer had condoned the transaction without a CTR. Olivarez placed the $18,000 in her purse. The bank filed a CTR for the transaction.

Olivarez was indicted under 31 U.S.C. § 5324(1), (3), and 18 U.S.C. § 2 for structuring a transaction to evade the reporting requirements of 31 U.S.C. § 5313(a). Pursuant to section 5324(1), it is a federal offense to "cause or attempt to cause" a bank to fail to file a CTR. The indictment tracked the language of the statute but replaced "or" with "and." Over the objections of defense counsel the jury instructions mirrored the language of the statute. The indictment was also read to the jury. The jury returned a guilty

verdict and Olivarez was sentenced to twelve months and one day imprisonment plus two years of supervised release. She timely appealed.

ANALYSIS

Olivarez contends that her conviction is constitutionally infirm because there is insufficient evidence to support one of the possible offenses recited to the jury. The jury instruction included in its list of criminal offenses the act of causing a financial institution to fail to file a CTR. The bank did, however, file a CTR. Olivarez concedes that the trial evidence was sufficient to support other offenses in the indictment.

On two separate occasions, Olivarez objected to the use of "or" in the jury instruction. Because the ground articulated at trial differs from the

ground Olivarez presents on appeal,[1] a plan error standard of review applies. Fed.R. Crim.P. 51, 52(b). However, closer scrutiny may be appropriate where, as here, "the failure to preserve the precise grounds for error is mitigated by an objection on related grounds." United State v. Lopez, 923 F.2d 47, 50 (5th Cir.), cert. denied, 111 S.Ct. 2032 (1991) (citing United States v. Brown, 555 F.2d 407, 420

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[1] In making the objection, counsel explained that because the indictment was phrased in the conjunctive, the government should be required to prove each element listed. This ground for objection has no merit. A disjunctive statute may be pled conjunctively and proved disjunctively. Turner v. United States, 396 U.S. 398 (1970); United States v. Pigrum, 922 F.2d 249 (5th Cir.), cert. denied, 111 S.Ct. 2064 (1991) (citing Crain v. United States, 162 U.S. 625 (1896)); Capps v. Collins, 900 F.2d (5th Cir. 1990), cert. denied, 111 S.Ct. 758 (1991); United States v. Merida, 765 F.2d 1205 (5th Cir. 1985); United States v. Webb, 747 F.2d 278 (5th Cir. 1984), cert. denied, 469 U.S. 1226 (1985).

(5th Cir. 1977), cert. denied, 435 U.S. 904 (1978)).[2]

Disjunctive statutes ordinarily may be read to the jury. United States v. Harrelson, 705 F.2d 733, 736 & n. 4 (5th Cir. 1983), cert. denied, 474 U.S. 1034 (1985); Cunningham v. United States, 356 F.2d 454 (5th Cir.) cert. denied, 384 U.S. 952 (1966). The jury instruction may be in error, however, if one of the recited grounds for conviction is prohibited and if

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[2] We decline to apply the "manifest miscarriage of justice" standard of United States v. Ruiz, 860 F.2d 615, 617 (5th Cir. 1988). See also United States v. Lopez-Escobar, 920 F.2d 1241, 1245 (5th Cir. 1991); United States v. Shaw, 920 F.2d 1225, 1230 (5th Cir.), cert. denied, 111 S.Ct. 2038 (1991). This standard applies to a motion for acquittal based on sufficiency of the evidence if that motion was made at the close of the government's case-in-chief but not renewed at the close of all the evidence. The ground presented in this appeal is distinct from a sufficiency-of-the-evidence motion for acquittal.

it is impossible to tell whether the jury selected that particular ground as the basis for conviction. Yates v. United States, 354 U.S. 298 (1957). In this case, it is almost certain that the jury did not find that Olivarez caused a failure to file a CTR. Government counsel claimed and witnesses testified to the jury without challenge that a CTR was filed. There was no evidence to the contrary.

A disjunctive instruction may also be in error if "'a genuine possibility of juror confusion'" suggests that the verdict was not unanimous. United States v. MMR Corp., (LA), 907 F.2d 489, 496 (5th Cir. 1990), cert. denied, 111 S.Ct. 1388 (1991) (quoting United States v. Phillips, 869 F.2d 1361, 1366 (10th Cir. 1988), cert. denied, 109 S.Ct. 2074 (1989), and citing United States v. Gipson, 553 F.2d 453 (1977)). Juror confusion will not be

presumed. Id.; see also United States v. Bolts, 558 F.2d 316, 326 n.4 (5th Cir.), cert. denied, 434 U.S. 930 (1977) (explaining the limited application of Gipson). A fair reading of the trial record does not reveal any cause for confusion. There is no suggestion that the verdict was not unanimous. At the request of defense counsel the court polled the 12 jurors, each of whom affirmatively replied that the verdict of guilty was his/her verdict.

Olivarez then contends that the trial judge erred in computing and imposing sentence. First, the court declined to accept a two-point offense level reduction for acceptance of responsibility. In sentence computations we accord great deference to the trial judge. United States v. Roberson, 872 F.2d 597 (5th Cir.), cert. denied, 110 S.Ct. 175 (1989).

To obtain this reduction under sentencing guideline 3E1.1 Olivarez had the burden of establishing that she had accepted responsibility for "all relevant criminal conduct." United States v. Mourning, 914 F.2d 699, 706 (5th Cir. 1990). A declaration of remorse is not enough; nor is a claim of sorrow for a claimed ignorance of the law. The trial judge refused to find that her acceptance of responsibility was sincere.

Olivarez then maintains that the court erred for not making a downward departure from the guideline sentence based on her claim that she sought no financial gain by the transaction. The judge considered but rejected this claim, concluding that an attempted tax evasion was the apparent gain. We will not disturb a sentencing court's refusal to depart from the guidelines unless we find such to be in

violation of the sentencing statute or guidelines. United States v. Hatchett, 923 F.2d 369 (5th Cir. 1991). We find no such violation here.

The other challenges to the sentence and sentencing procedure are without merit and require no discussion.

The conviction and sentence are AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2826

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TEODORA OLIVAREZ,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion July 25, 5 Cir., 1991, ___F.2d___)
(August 21, 1991)

Before POLITZ, DAVIS and BARKSDALE, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

REHG-8

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

Criminal No. M-90-152-01

UNITED STATES OF AMERICA,
Plaintiff

versus

TEODORA OLIVAREZ,
Defendant

FINAL JURY INSTRUCTIONS (Partial)

Also in any criminal case the Government must prove not only the essential elements of the offense charged, as I will give them to you shortly, but they must of course prove the identity of the defendant as the one who committed the alleged offense.

If after examining all the evidence in the case you have a reasonable doubt as to the identity of the defendant as the one

who committed the offense charged, you must find her not guilty.

Ladies and gentlemen, as I told you this morning, you are going to have a copy of the Indictment in that jury room for your deliberations.

It reads as follows: It alleges that on or about April 13th, 1988, in the Southern District of Texas and within the jurisdiction of the court, the defendant Teodora Olivarez, did knowingly and willfully for the purpose of evading the reporting requirements of Title 31, U.S. Code Section 5313 (a) cause and attempt to cause a domestic financial institution, to wit, the First National Bank of Rio Grande City, Texas, to fail to file a report required under Section 5313 (a), and did cause and attempt to cause, structure, attempt to structure, and assist in structuring, a transaction with First

National Bank of Rio Grande City, Texas, by exchanging $18,000 in $5 United States currency bills for $100 bills, by structuring the transaction by dividing the exchange into two exchanges of $9,000 each.

And ladies and gentlemen, they allege that this is a violation of Title 31, U.S. Code Sections 5324 (1) and (3) and Title 18, U.S. Code Section 2.

And ladies and gentlemen, Title 31, U.S. Code Section 5313 (a) as referred to in the body of the allegation of the Indictment, reads as follows, the important part with regards to the allegations in this case: Title 31, U.S. Code Section 5313 (a). It says when a domestic financial institution is involved in a transaction for the payment, receipt or transfer of United States coins or currency or other monetary instruments the Secretary of the Treasury prescribes in an amount,

denomination or amount and denomination under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes.

The regulations setting forth the requirements are in Title 31, Code of Federal Regulations, Section 103.22 (a)(1), and the important part with regards to the allegations in this Indictment reads as follows: It says, each financial institution, other than a casino or the Postal Service, shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer by, through, or to such financial institution which involves a transaction in currency of more than $10,000. Multiple currency

transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totalling more than $10,000 during any one business day.

And ladies and gentlemen, the regulations define a transaction in currency as a transaction involving the physical transfer of currency from one person to another. Currency does include cash, and it includes, quote, the coin and paper money of the United States or of any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of the issuance, and also includes U.S. silver certificates, U.S. notes and Federal Reserve notes.

Ladies and gentlemen, Title 31, U.S. Code Section 5324, states the following:

It says -- this is the statute the Government is saying the defendant violated -- Sections (1) and (3) read as follows: It says, no person shall for the purpose of evading the reporting requirements of Section 5313 (a) with respect to such transaction, (1) cause or attempt to cause a domestic financial institution to fail to file a report required under Section 5313 (a), or (3) structure or assist in structuring or attempt to structure or assist in structuring any transaction with one or more domestic financial institutions.

Let me read that statute again, the parts that apply in this case. This is Title 31, U.S. Code Section 5324. It says no person shall for the purpose of evading the reporting requirements of Section 5313 (a) -- Section 5313 (a) is the one that I read to you a little while ago -- and then

this statute reads, continues with respect to such transaction (1) cause or attempt to cause a domestic financial institution to fail to file a report required under Section 5313 (a) or (3) assist or assist in structuring or attempt to structure or assist in structuring any transaction with one or more domestic financial institutions.

The term "structuring" has been defined in Title 31, Code of Federal Regulations, Section 013.11(n) as follows: A person structures a transaction if that person acting alone or in conjunction with or on behalf of other persons conducts or attempts to conduct one or more transactions in currency in any amount at one or more financial institutions on one or more days in any manner for the purpose of evading the reporting requirements under Section 103.22 of this part.

"In any manner" includes but is not limited to the breaking down of a single sum of currency exceeding $10,000 into smaller sums, including sums at or below $10,000 or the conduct of a transaction or series of currency transactions, including transactions at or below $10,000. The transaction or transactions need not exceed the $10,000 reporting threshold at any single financial institution or any single day in order to constitute structuring within the meaning of this definition.

Ladies and gentlemen, in order to find that the defendant is guilty of the offense alleged in this Indictment, the Government must prove each of the following three elements beyond a reasonable doubt.

First, that the defendant knew that the institution named in the Indictment, this First National Bank of Rio Grande City, was a financial institution with a

legal requirement to report a currency transaction as required under Title 31, Code of Federal Regulations, Section 103.22 (a)(1).

So that's the first thing that has to be proven to you beyond a reasonable doubt in order to convict the defendant of this allegation, first, that the defendant knew that the institution named in the Indictment was a financial institution with a legal requirement to report a currency transaction as required under Title 31, Code of Federal Regulations, Section 103.22 (a)(1).

Second, that the defendant knowingly and willfully caused or attempted to cause a domestic financial institution to fail to file a report required under Section 5313 (a) or knowingly and willfully caused or attempt to cause structure or attempt to structure and assist in structuring a

currency transaction as alleged in the Indictment.

And third, that the defendant in causing or attempting to cause a domestic financial institution to fail to file a report required under Section 5313 (a) or in causing or attempting to cause a structure or attempting to structure or assisting in structuring a transaction as alleged in the Indictment did so knowingly and willfully with the specific intent for the purpose of evading the currency transaction reporting requirements of Title 31, Code of Federal Regulations, Section 103.22 (a)(1).

So those are the three things that need to be proved in order for you to be, find the defendant guilty of this offense, and they have to be proven to you beyond a reasonable doubt.

Ladies and gentlemen, also in the Indictment the allegation is that the defendant violated Title 18, Section 2, Title 18, U.S. Code Section 2. This is what is known in the United States as aiding and abetting statute, and in this country the guilt of a defendant in any criminal case may be established without proof that she personally did every act constituted in the alleged offense.

The law recognizes in this country that ordinarily anything a person can do for herself may also be accomplished by her through the direction of another person as his agent -- as her agent -- or acting in concert with or under the direction of another person or persons in a joint effort or enterprise.

Title 18, U.S. Code Section 2, reads as follows: Whoever commits an offense against the United States, or aids, abets,

counsels, commands and uses or procures its commission is punishable as a principal. Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

So in other words under the aiding and abetting statute, if the acts or conduct of any agent, employee, or other associate of the defendant are willfully directed and authorized by her, or if the defendant aids and abets another person by willfully joining together with such person in the commission of a crime, then the law holds the defendant responsible for the acts and conduct of such other persons just as though she had committed the acts or engaged in such conduct himself, herself.

Notice, however, that before any defendant may be held criminally

responsible for the acts of others, it is necessary that the defendant willfully associate herself in some way with a criminal venture, and willfully participate in it as she would in something she wishes to bring about, that is to say that she willfully seeks by some act or omission of hers to make the criminal venture succeed.

Of course mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a spectator. In other words you may not find the defendant guilty under the aiding and abetting statute unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person

or persons, and that the defendant willfully participated in its commission.

When you go into that jury room you are going to note that the Indictment or the charges that the offense was committed on or about a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

The word "knowingly" as that term has been used from time to time in these instructions means that the act was done voluntarily and intentionally, and not because of mistake or accident.

The word "willfully" as that term has been used from time to time in these instructions means that the act was committed voluntarily and purposely, with

the specific intent to do something the law forbids, that is to say with bad purpose, either to disobey or disregard the law.

The crime charged in this case is a serious crime, which requires proof of specific intent before the defendant can be convicted.

"Specific intent" as the term implies, means more than the general intent to commit the act. To establish specific intent, the Government must prove the defendant knowingly did an act which the law forbids, purposely intending to violate the law, and such intent may be determined from all the facts and circumstances surrounding the case.

I also caution you here, ladies and gentlemen, that you are here to determine whether the defendant is guilty or not guilty from the evidence in this case.

She is not on trial for any act or conduct or offense not alleged in the Indictment, neither are you being called upon to return a verdict as to someone else who is not on trial in this case.

Also the punishment provided by the law for this particular offense in Federal Court is a matter exclusively for the decision of the judge, and should in no way be considered by you in deciding as to whether to return a verdict of Guilty or Not Guilty with regards to this charge.

Any verdict that you return has to be unanimous, whether it's Guilty or Not Guilty. Every single one of you has to agree to it. You have not reached a verdict as to Guilty or Not Guilty until every single one of you has agreed to it.

When you are in there deliberating, it is your duty to consult with one another in order to reach agreement, if you can do so

without violence to your own individual judgment. Each of you obviously has to decide the case for yourself, but only after a fair and impartial consideration of the evidence in the case with your fellow jurors.

While you are deliberating, do not hesitate to re-examine your own views or change your opinion, if you are convinced that it was wrong. But do not surrender your honest conviction as to the weight or the effect of the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

In that regard, you can take as long as you want to reach your verdicts in this case, or as short as you want. No one will be out here when you come out here saying they took too long a time or they took too

short a time. That's strictly your decision.

The only thing that is required is that you consider all the evidence and that you follow the law as I have given it to you.

And also you're not here for one side or the other. You're judges of the facts in this case. Your sole interest is to seek the truth from the evidence in the case. When you do retire into the jury room to start your deliberations, the first thing I want you to do is to select a foreperson. That person presides over your deliberations and is your spokesperson in the courtroom. Once you have done that and you have received a copy of the Indictment and the jury verdict form, it says we, the jury, find Teodora Olivarez, the defendant here, insert "Guilty" or "Not Guilty" on Count One as charged in the Indictment.

Foreperson signs it and dates it, and please use a pen.

When you have reached your verdicts, and the foreperson lets the marshal know that you have reached a verdict, please fold the verdict form, and you will be brought into the courtroom. I will ask for the verdict form here in the courtroom and then it's brought up to me by the marshal and I read it out loud here in the courtroom.

If at any point you need to send me a note, there is a jury note form, fold it up after you have written the note on there, and give it to the marshal, and I will either respond to you in writing or here in the courtroom out loud.

But don't ever send me a note that says we are divided and so many of us are voting this way and so many of us are voting this other way. If there is a

numbers division while you are deliberating, we can't know what those numbers are, so don't ever send me a note that gives me the numbers if you're divided.

Also when you're deliberating if one of you takes a break, quit talking about the case and wait for that person to come back. That way everybody else hears what everybody else has to say.

Those are my instructions. I need to briefly visit with the attorneys. I'm going to ask you to wait outside in the hallway for just a second.

Please rise for the jury.

(Jury out, the following proceedings were had in open court:)

THE COURT: Please be seated.

Mr. Leonard, do you have any objections, corrections, or additions to the Court's instructions?

MR. LEONARD: No, sir.

THE COURT: Mr. Villarreal?

MR. VILLARREAL: Your Honor, I would stand on my prior objection to the phrasing in the different charges in the dysjunctive as opposed to the conjunctive.

THE COURT: Okay, the Court will overrule that.

* * * * *

(The following proceedings were had in open court, in the presence of the jury:)

THE COURT: Please be seated.

Ladies and gentlemen, the term "financial institution" does include under the statutes, applicable statutes here, a bank whose deposits are insured by the Federal Deposit Insurance Corporation.

* * * * *

The rest of you all, if you all would go into the jury room, select your foreperson. When you receive the

Indictment and the verdict form, go ahead and start your deliberation, and when you have reached a verdict let the marshal know.

Please rise for the jury.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

Criminal No. M-90-152-01

UNITED STATES OF AMERICA,

Plaintiff

versus

TEODORA OLIVAREZ,

Defendant

PROSECUTOR'S JURY ARGUMENTS (Partial)

THE COURT: Ladies and gentlemen, I've told each one of the attorneys that they've got fifteen minutes to argue the case.

Under the rules the Government's attorney, Mr. Leonard, goes first, and he can save some time for rebuttal. Mr. Villarreal, the defense attorney, goes second, but he has to use all his time up at the same time.

Mr. Leonard, you've got fifteen minutes, sir.

MR. LEONARD: Thank you, sir.

If it please the Court and counsel.

Ladies and gentlemen, I told you this morning this would be a relatively short trial, but it's nonetheless important. It's important, because the United States has charged there is a violation of the law.

Now whether or not we agree with that law is inimportant, because as jurors you have taken an oath to follow the law as the Judge is going to give it to you.

You may not like $10,000 reporting requirements, that is the law, and the Judge will give you that specific law, and explain some of the technicalities to you.

Your job as jurors is judges of the fact. You have to figure out that if on or about April 13, Miss Olivarez tried to evade reporting requirements or help evade the reporting requirements of that bank, that is the reporting requirements that they report any amount over $10,000, by attempting to structure, and actually structuring those transactions that she was involved in. That's your duty.

And how did she do it? By exchanging $18,000 in $5 bills into $100 bills of nine thousand each, she split it up into nine thousand, so as not to trigger that ten thousand.

And who does she have in with her? She says her mother, and I would accept that, and it's really a shame. And let's look at the difference of testimony we have here.

You have three bankers basically. These bankers come to you -- first of all, I'll tell you about Mr. Gilbert Alvarado, over at First City here. She worked under him, and they always give this training about the $10,000.

So this lady, she already knew about that reporting requirement, not just like any Joe Blow off the street, but a person who deals in banking and knows the ten thousand, because they give these constant courses, and she admitted she knew about it.

So who do we have next? Elmo Moreno, and here is where it really gets different. Somebody is not exactly careful with the truth. It's like the old Annie Get Your Gun play, they say they're not exactly lying, they're just not careful with the truth.

Your job is to truth-seek. What is the truth?

She states, well, she went in to Mr. Moreno, and even though Mr. Moreno had never seen her before and had only dealt with her husband, he was talking to her about having her buy his house in a house deal.

Mr. Moreno says, "I didn't even have a house for sale at that time. I've never talked to her about a house deal." Who is telling the truth?

She goes on to discuss with you the fact that whether or not her mother was there when she was talking to Mr. Moreno. And then again she acknowledges, yes, she knew about that $10,000 requirement, but for some odd reason she has to go in and tell this banker about these $5 bills, if she knows about this ten thousand requirement.

What is she so nervous about if she wasn't intending to violate the law?

And then it's a clincher, she tries to bribe Mr. Moreno. Mr. Moreno had been a banker a long time up there in Rio Grande.

Mr. Moreno, I asked him, "Why do you remember this? How many times have you had people offer you money to get you to violate that section of the law, to get you to structure those transactions or allow you to structure and not fill out those reporting requirements? How many times before or since this defendant came in and asked that?" Never.

* * * * *

No, she was there to take $18,000 in $5 bills, which she claims to have gotten from a deceased brother, $18,000 in $5 bills, to exchange them into easier

carrying currency, I submit to you, which is $100 bills.

And knowing full well that currency transaction reporting requirement, she first of all tried to get around it by bribing Mr. Moreno, and then when that didn't work she tried to get around it by going to Miss Sepulveda and saying Mr. Moreno had okayed it, and no, I'm not going to give you the information, trying to get out without being noticed who she really was.

And it may take a little time, but she was finally caught, and brought here before you.

I'll reserve my time, your Honor.

THE COURT: You've used about nine minutes.

Gentlemen, I need to visit with you all, and rather than just doing it up

here I'm going to go ahead and send the jury out for a few minutes.

Please rise for the jury.

(The following proceedings were had in open court, outside the presence of the jury:)

THE COURT: You all go ahead and have a seat.

Mr. Leonard, exactly what are you proceeding on here? You've charged her with two different things in this Count One of the Indictment.

MR. LEONARD: On the --

THE COURT: You've charged her with causing and attempt to cause a domestic financial institution to fail to file a report, and structuring. So which one are you proceedings on, both of them or one of them or what?

MR. LEONARD: Both of them, your Honor.

THE COURT: Well, aren't those two separate charges?

MR. LEONARD: Your Honor, I believe --

THE COURT: They're two different parts of the statute.

MR. LEONARD: Then I would proceed just on the structuring, your Honor.

THE COURT: You've charged her with 5324 (1) and (3) here.

MR. LEONARD: Yes, sir.

THE COURT: Wouldn't that be two separate charges?

MR. LEONARD: Your Honor, I would have it as a violation of 5324 --

THE COURT: Wouldn't there be a punishment for each one of them under the penalty provisions? Where is that?

MR. LEONARD: I believe the penalty provisions is No. 5322, your Honor.

THE COURT: It's not in this book. Can I get you to get that for me? Here it is.

MR. LEONARD: It's 5322 (a), your Honor.

THE COURT: Aren't those two separate violations?

MR. LEONARD: Your Honor, the way I read it is that violation --

THE COURT: It says "or"

MR. LEONARD: -- is 5313 with respect to each transaction --

THE COURT: 5324 says no person for the purpose of evading a reporting requirement of Section 5313 (a) with respect to such transaction cause or attempt to cause a domestic financial institution to fail to file a report required under Section 5313 (a) to cause or attempt to cause a domestic financial institution to file a report required under

Section 5313 (a) that contains a material omission or misstatement of fact or structure or assist in structuring or attempt to structure or assist in structuring any transaction with one or more domestic financial institutions.

So what are you proceeding under here? I mean what's the violation that you are alleging here?

MR. LEONARD: Your Honor, I was alleging a violation of (1) and (3). If the Court is saying --

THE COURT: I don't know what I'm saying. This is your responsibility. You're the one that charged her. It's not my responsibility to find out what the law is. You charged her with this.

Is this two separate violations, or one, or what?

MR. LEONARD: It is one violation, your Honor, in which she violated both of these subsections of this one violation.

THE COURT: And you don't need to allege that in separate counts of the Indictment, or what?

MR. LEONARD: No, your Honor, I don't believe so.

THE COURT: And why not?

MR. LEONARD: Because it's a violation of the one of --

THE COURT: It says "or", it doesn't say "and".

MR. LEONARD: And I'd put in my Indictment, trying to --

THE COURT: You put "and".

MR. LEONARD: "And", that is a conjunctive, I have to prove both.

THE COURT: So you're saying you have to prove both of these things in order to convict her?

MR. LEONARD: I believe if I put it in there, your Honor, I've done more than --

THE COURT: That's not what the law is. The law is when you put "and" in, and it's "or" in the statute, you have always argued, and that's what the law is, that "or" is enough, that it doesn't have to be "and".

But if you want to have me instruct them in that fashion, that's fine.

But this is another example of how you all word these indictments in such a fashion that you all don't really pay much attention to them.

You all had plenty of time. You all can decide when they take them to the Grand Jury. It's like when they hit you with them all at once. That's why you all should pay more attention to these.

What were you arguing to the jury here?

MR. LEONARD: On my final version here I was arguing structuring, your Honor.

THE COURT: From hearing your argument, it wasn't clear to me what you all were proceeding on. It's still not clear to me what you all are proceeding on.

We'll take a shore break here.

(Recess taken at 2:55 p.m.)

(The following proceedings were had in open court, outside the presence of the jury:)

THE COURT: She was charged earlier with a violation of 5324, and then you put (1) and (3) here.

MR. LEONARD: Yes, sir.

THE COURT: The statute reads (1) or (3), and the case law appears to be when that is the case, although you may have said "and", that the Court can instruct them as "or", but if you want me to instruct them as "and", that's fine with me, I don't have any problem with that.

MR. LEONARD: Your Honor, the case law follows --

THE COURT: Did you find anything, or did you sit here the whole time we were out looking at this?

MR. LEONARD: No, your Honor, I've been looking in the material I have here, and I did not find anything.

THE COURT: You're not going to find anything in the materials that you have here.

MR. LEONARD: And I went to my Title 31 file and I didn't find anything in my Title 31 file, your Honor.

THE COURT: The way the Court's going to instruct them is first that elements that would be required would be first that the defendant knew that the institution named in the Indictment was a financial institution with the legal requirement to report a currency transaction as required

under Title 31 Code of Federal Regulations, Section 103.22 (a)(1), second, that the defendant knowingly and willfully caused and attempted to cause a domestic financial institution as alleged in the Indictment to fail to file a report required under Section 5313 (a), or structured or assisted in structuring a currency transaction as alleged in the Indictment, and third, that the defendant in causing and attempting to cause a domestic financial institution to fail to file a report required under the law, or in structuring or assisting in structuring in the currency transactions as alleged in the Indictment, did so knowingly and willfully with the specific intent for the purpose of evading the currency transaction requirements of Title 31 Code of Federal Regulations, Section 103.22 (a)(1).

I don't know how else to pursue this, other than in this fashion.

MR. LEONARD: Your Honor, that sound acceptable to the Government.

THE COURT: Mr. Villarreal?

MR. VILLARREAL: Obviously, your Honor, I'm going to object to that.

I feel that the Government is obligated to prove that they pled. Since they pled it in the conjunctive, your Honor, I would suggest that that is their obligation, and I would request from the Court to --

THE COURT: Well, you couldn't have been surprised by that. You never raised it before.

5324 (1) and (3) are specifically alleged here, Title 31, Section 5324 (1) and (3), it's very clear the requirement of the structuring is also that it be for the

evading purposes, the same as for number one also.

This shouldn't come as a surprise to anybody here.

MR. VILLARREAL: Fine, Judge, I would just like to make my objection for the record.

THE COURT: And your objection is what?

MR. VILLARREAL: The Government should be required to prove what they have pled, that both violations occurred, your Honor. They allege them in that manner, and I think that they should be required to prove them in that manner.

The fact they have set a higher burden for themselves than possibly the law requires is the Government's doing, it has nothing to do with us, Judge.

THE COURT: The law doesn't require that, even though they've said "and"

If you want me to, I'll be glad to say "and".

MR. LEONARD: You Honor, the Court said the Court found a case --

THE COURT: Not in this kind of transaction. In other cases, like where we have attempts on a Federal official, like a Customs agent or somebody like that, when it's a question of impeding or attempting to impede or whatever, a lot of time you put "and" in there for assault and all those other things that you usually alleged in those kind of cases --

MR. LEONARD: On the allegation, yes, your Honor.

THE COURT: -- the cases in those are clear that it's "or". I suspect that it would be the same thing here.

I'll leave it up to you as the way you want to proceed with this.

MR. LEONARD: I would request that it be given in the dysjunctive "or".

THE COURT: I think that's right, I don't have any problem with that.

Go ahead and bring the jury in so we can continue, and you can start your fifteen minutes.

MR. VILLARREAL: The Court then has overruled my objection, sir?

THE COURT: Yes, sir.

MR. VILLARREAL: Thank you, sir.

(At 3:15 p.m. the following proceedings were had in open court, in the presence of the jury:)

THE COURT: Please be seated.

Mr. Villarreal, you've got fifteen minutes to argue your side of the case.

* * * * *

THE COURT: Thank you, Mr. Villarreal.

Mr. Leonard, you've got six minutes and thirty-five seconds left.

MR. LEONARD: Thank you, sir.

Ladies and gentlemen, you have heard a skillful argument for the defense. As Mr. Villarreal told you when he first spoke, and as the Judge will probably tell you when he gives you the law, arguments by the attorneys are not evidence.

For instance Mr. Villarreal was saying about these agents going to intimidate her or such. Have you ever heard any evidence of such a thing? No. Because it's Mr. Villarreal's conjecture, Mr. Villarreal's speculation, and he wants you to get your focus away from his client and try to say, "Ho, those bad Government agents upholding the law, and trying to investigate." Just as when he said, "Well, what did they do?" "Oh, we're

investigating a bank," or "investigating some bank violations," or what was it?

See, he's trying to get your attention away from that woman over there to get your mind speculating, man, that bank from Starr County, all those people from Starr County must be bad, maybe they're investigating that bank from Starr County.

Ladies and gentlemen, people from Starr County and bankers from Starr County are just like everybody else, and they're not necessarily bad because they're from Starr County. In fact what they do over there is they have very specific procedures so as not to violate the law, not to fail to file a Currency Transaction Report, even though other people are trying to get them not to by bribing them, and when that does not succeed by structuring the transaction.

No, see he's trying to pull your focus away from who is on trial here, and make it on that big bad Government. Like hey, you didn't bring the agents.

Ladies and gentlemen, the agents weren't there when the crime occurred. What could they testify to? They can only testify as to what happened when the crime occurred. Or the tape, the tape, a copy was presented to the lady that actually did it, that actually did it. She looks, she says, "Yes, my memory is refreshed. I know exactly what went on that day. How do I know? Because I can see from my work, that's how I know, besides being able to remember."

And Mr. Alvarado said she was honest. Well, that was at the time she was working for Mr. Alvarado. And I submit to you if she wasn't at that time and if he

found out about about it, if he found out about it, he would fire her.

MR. VILLARREAL: Objection, your Honor.

MR. LEONARD: That --

THE COURT: Mr. Leonard, both of you, let's stick to the evidence that was in this case rather than going off on all these things that have nothing to do with the charges in this case. Let's rely on that.

MR. LEONARD: Thank you, your Honor.

THE COURT: And ladies and gentlemen, I'll tell you that again, these arguments of the attorneys, they're not evidence in the case.

Go ahead.

MR. LEONARD: And ladies and gentlemen, getting back to what Mr. Villarreal said in the very beginning, remember when he said the argument of the

attorneys is not evidence? And that's what he said. And he's brought you on all these rabbit trails, Government agents, of banks, of honesty, all these other rabbit trails that have nothing to do with this crime, the crime is a structuring crime, making the bank fail to file these Currency Transaction Reports, and her failing to file them.

And that's exactly what she did from the evidence that was given to you by those people, the people that were there that day. I was not there, you were not there, Mr. Villarreal was not there. The people that were there that day were those two bank people, the assistant vice-president, who she actually came in to and offered to bribe, and he remembers it because it's the only time it's ever occurred to him in seventeen years of banking.

And the young lady who was the cashier, who asked her repeatedly for an I.D., asked her to help fill out this form that she was going to fill out, and no. And what did she do, she reported it.

So it made an impression on them at that very time that they reported it as a violation, and now she comes up here and says no, it not only didn't happen that way, but I wasn't at that teller, I was at someplace else, and no, I didn't have that conversation with that banker, I had some other conversation.

That's the real crux of this case, not the wild speculations of the defense, about what if, what if, what if.

Remember the evidence does not come from a skillful attorney, it comes from that witness chair, what those witnesses tell you. That's what you believe or disbelieve, and we could tell

you as attorneys it's daylight or dark, it's immaterial whether we say that.

The evidence comes from that witness chair, and the evidence you have allows you to return a verdict of guilty.

THE COURT: Thank you, Mr. Leonard.

Ladies and gentlemen, you have heard the closing arguments of the attorneys, as well as all the evidence in the case.

It becomes my job therefore to instruct you on the rules of law that you have to follow and apply in arriving at your verdicts in the case, your verdict in the case.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

Criminal No. M-90-152-01

UNITED STATES OF AMERICA,

Plaintiff

versus

TEODORA OLIVAREZ,

Defendant

District Court's Instructions On
Jury Notes 1 & 2

(At 6:40 p.m. the following proceedings were had in open court, outside the presence of the jury:)

THE COURT: I have Jury Note No. 1 that simply states, testimony of defendant that she made one transaction with the teller and her mother went to another teller. I suspect they want us to read that portion of the testimony back. I

don't exactly know, I suspect that this was as a result of direct examination.

The only thing I can think of is to ask Miss Faris to go through her notes on that part and see if she gets to a point that we come up with this.

Mr. Leonard, do you have any problem with that?

MR. LEONARD: No, your Honor, if I could see what Miss Faris comes up with, because the question is a little bit vague.

THE COURT: Mr. Villarreal, do you have any problem with that?

MR. VILLARREAL: No objection, sir.

(Recess taken.)

(The following proceedings were had in open court, outside the presence of the jury:)

THE COURT: Gentlemen, my suggestion would be that we start at the point where she's come inside with her mother and stop

at the point, the answer right before the question as to does she have her purse with her.

MR. LEONARD: I would accept that.

MR. VILLARREAL: I would concur with the Court, your Honor.

* * * * *

THE COURT: I'm going to tell them that it's hard to understand their question, but what I think they're asking is this portion of the testimony, that if it's not for them to let us know. Okay?

Go ahead and bring them in.

(Jury in at 6:55 p.m., the following proceedings were had in open court:)

THE COURT: Please be seated.

Mr. Arredondo, you're the foreperson, sir?

JURY FOREMAN: Yes, sir.

THE COURT: Okay. I've received a note from you that says testimony of

defendant that she made one transaction with a teller and her mother went to another teller.

And ladies and gentlemen, it's hard to understand exactly what you want from this. I suspect this means that you want a particular portion of a testimony read back. I have tried to identify something on the record that -- you know, this was a relatively short trial -- and I have tried to identify something on the record that might be what you are asking for. It may not be, and if it's not, you're going to have to send me another note saying that's not what we're looking for.

And Miss Faris, would you please read that portion.

THE REPORTER:

"Q. What did you do after you spoke to your mom in the car?

"A. She got down from the car, and we went inside the building.

"Q. And what did you do?

"A. I went to a teller, and my mother went to another teller.

"Q. Do you remember the name of the teller that you went to?

"A. Yes, sir.

"Q. What was her name?

"A. Thelma Garcia.

"Q. Do you remember the name of the teller that your mother went to?

"A. Yes, sir.

"Q. And what is her name?

"A. Criselda Sepulveda.

"Q. That is the same Miss Sepulveda who testified earlier?

"A. Yes, sir."

THE COURT: Mr. Arredondo and the rest of you, I'm not sure that that's what you are looking for or not. If it's not,

please send me a note and better identify what you are looking for. And that was my answer to that particular note.

If you all would just go back in there and continue deliberating.

Please rise for the jury.

(Jury out to resume deliberating.)

THE COURT: Gentlemen, if you all would continue to make yourselves available in case we have a jury verdict or a note.

(Recess taken.)

(At 7:05 p.m. the following proceedings were had in open court. outside the presence of the jury:)

THE COURT: Gentlemen, you all go ahead and have a seat.

I have Jury Note No. 2. It says during which time was Thelma Garcia notified about the transaction, was it during the second transaction or after it was made and Miss Olivarez had left the

building, and/or was Thelma Garcia present during the transaction, according to Miss Sepulveda's testimony.

* * * * *

(The following proceedings were had in open court, in the presence of the jury:)

THE COURT: Please be seated.

I have Jury Note No. 2 from you, Mr. Arredondo, I guess there's two questions: The first one, during which time was Thelma Garcia notified about the transaction, was it during the second transaction or after it was made and Mrs. Olivarez had left the building, question mark.

Well, ladies and gentlemen, you are the fact finders. I can't be answering questions with regards to answers that like, that require an answer like that. You all heard the testimony, it was relatively short. We didn't have more than

two hours worth of testimony in this case, and this question says during which time was Thelma Garcia notified about the transaction, was it during the second transaction or after it was made and Mrs. Olivarez had left the building.

And then you go: And/or was Thelma Garcia present during the transaction, according to Miss Sepulveda's testimony.

If you are asking for a portion of Miss Sepulveda's testimony or someone else's testimony, you're going to have to identify what you are looking for, but I can not be answering questions with regards to asking me during which time was such-and-such notified, because you're the fact finders, you all have to make a decision as to the facts.

This trial, as far as testimony, we didn't have more than two hours' worth

of testimony in this case, as far as witnesses testifying.

If there is a portion of somebody's testimony, whether Miss Sepulveda or somebody else that you are looking for, you've got to identify that and say we want this portion of this testimony read back, whether it's Miss Sepulveda or whoever else.

But you've got to identify for me what it is you're looking for, I can not be guessing what you're looking for, and you've got to identify that, and you've got to identify it by indicating in response to such-and-such question or with regards to such subject we'd like such-and-such read back to us.

I can't just be saying, well, this is the answer, because you all have to make a decision as to the facts. And if you want somebody's testimony, Miss

Sepulveda or somebody else's portions read back, you're going to have to identify what portion you're looking for, and what you're asking for.

Other than that, it would be very difficult for me to be able to respond to that.

So if that's what you're looking for, you've got to identify it.

Please rise for the jury.

(Jury out.)

THE COURT: Mr. Leonard, did you have any problem with that?

MR. LEONARD: No, sir.

THE COURT: Did you, Mr. Villarreal?

MR. VILLARREAL: No, sir.